



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NUMBER 330 OF 2019



BETWEEN

WYNESS NYIRENDA.....1ST CLAIMANT

TIONGE HONDE.....2ND CLAIMANT

AND

EVANCE PHIRI.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: KAPASWICHE	: ASSISTANT REGISTRAR (AR)
Kambalame	: Counsel for the Claimant
Chapo	: For the Defence
Matope	: Clerk / Official Interpreter

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

This is a claim for damages for pain and suffering; loss of amenities of life; disfigurement; loss of earning capacity; cost of police and medical report and costs of the action. The matter was commenced on the 14th day of April 2019. On 20th June 2020, a summary Judgment was entered on all the claims against the Defendant and the matter was referred for assesment of damages. On assesment of damages; only the second Defendant attended hearing as the first Defendant did not attend and no reasons were given for his fallure to attend the assesment hearing. This is my determination on the damages payable in the present case.

THE EVIDENCE

The first Claimant was the first witness in the present case. She adopted her witness statement. Her evidence was that on or around 12th April 2019 at around 19:00 hours she was a pedestrian from the direction of Rumphiboma going towards Bolero with friends. Upon arrival at Kawajawaja maize mill, a motor cycle at excessive speed driven by the first Claimant lost the road hitting her and other three pedestrians. As a result of the accident, she sustained fracture of the left tibia and fibula, leg was shortened by 2cm, she was unable to walk properly, she had pains on the rib side, multiple abrasions and scars on the affected parts. She was taken to Rumphidistrict Hospital where she was hospitalized for one week and was thereafter treated as an outpatient for 8 months. Pw1 had her leg cast in POP three times. The effects of the injuries that she suffered are that she still experiences pain on her leg, she still walk on serious limp, she can no longer bend or squat and she can no longer walk for a long distance without feeling pain. It was the evidence of the first Claimant that she used to travel for business of selling bananas and she was able to make between MK15,000.00 to MK20,000.00 per day and with her condition she can no longer continue doing the business in question.

In cross-examination; she stated that she was treated at Rumphihospital and she confirmed that the medical report does not have a stamp for the hospital from which it was authored. She further confirmed that she has not brought evidence for the income that she claimed to be making in her business prior to the accident.

PW2 was the second Claimant. The narration of the circumstances surrounding the accident was the same as explained by PW1. The injuries suffered by PW2 were moderate head injury; painful neck; dislocated left shoulder, multiple abrasions and scars on the affected parts. She was hospitalized for three days at Rumphi District Hospital and treated as an outpatient for a day. As a consequence of the accident, PW2 stated that she still experiences pain on her neck and that she can no longer carry heavy objects on her head. She used to do business of selling avocados carrying them on her head and she was making MK10,000.00 to MK18,000.00 per day. She no longer does the business as she can no longer carry objects on her head. Her permanent incapacity was assessed at 34%.

For the second Defendant, no witnesses were paraded. Defence Counsel addressed the Court to the effect that the liability of the second Defendant is limited to MK5,000,000.00 and this was confirmed by Counsel for the Claimants. Defence Counsel undertook to file submissions within 14 days but the said submissions were never submitted.

THE LAW ON DAMAGES

The law generally provides that a person who suffers bodily injuries or losses due to the negligence of another is entitled to recover damages. The fundamental principle which underlines the whole law of damages is that the damages to be recovered must, in money terms, be no more and no less than the Plaintiff's actual loss. The principle was laid down in numerous case authorities more particularly by Lord Blackburn in the case of *Livingstone v. Rawyards Coal Company* (1880) 4 AC 25 in the following terms:

"where any injury or loss is to be compensated by damages, in settling a sum of money to be given as damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered loss, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

Be that as it may, it ought to be borne in mind that it is not possible to quantify damages for pain and suffering, loss of amenities and deformity as claimed in this matter with mathematical precision. As a result, courts use decided cases of comparable nature to arrive at awards. That ensures some degree of consistency and uniformity in cases of a broadly similar nature: See *Wright -vs- British Railways Board* [1983] 2 A.C. 773, and *Kalinda -vs- Attorney General* [1992] 15 M.L.R. 170 at p.172. As

such this court will have recourse to comparable cases to arrive at the appropriate quantum of damages for the plaintiff.

SUBMISSIONS AND ANALYSIS

DAMAGES FOR PAIN AND SUFFERING

'Pain' is used to suggest physical experience of pain caused by consequent act upon the injury while 'suffering' relates to the mental elements of anxiety, fright, fear of future disability, humiliation, embarrassment, sickness and the like as was held in *City of Blantyre v. Sagawa* [1993] 16 (1) MLR 67 (SCA).

DAMAGES FOR LOSS OF AMENITIES OF LIFE

The head of loss of amenities of life is awarded to cater for loss of all things that the claimant used to be able to do, see and experience and that these things can no longer be seen or be done or be experienced due to the impact of the injury in question. In the case of *Mtika v Chagomerana t/a Trans Usher* (1997) 2 MLR 123, 126; the court explained loss of amenities of life in the following terms;

"there is loss known as the loss of amenities of life. This covers the loss caused by the injury in that the plaintiff will be unable to pursue the leisure and pleasures of life that he used to enjoy but for the injury"

DAMAGES FOR DISFIGUREMENT

Damages for disfigurement are awarded for some form of permanent scars or deformity left on the body of the victim as was held in the case of *Tabord v. David Whitehead and Sons (Mw) Ltd*, (1995) 1 MLR 297 (SCA).

DAMAGES OF LOSS OF EARNINGS AND EARNING CAPACITY

Loss of earnings is the total loss or actual reduction in the income of the Claimant as a result of the injury suffered, while loss of earning capacity is the likely or prospective loss or reduction in the

income of the Claimant as a result of the injury suffered. See **Kambwiri v Attorney General [1991] 14 MLR 151 (HC)**. In injuries involving amputation and crushing of fingers, the hand will have been rendered of very little use and such grip as remains will be exceedingly weak. See **Barrie, P., Compensation for Personal Injuries**, 1st Ed at pages 318 – 319. To calculate damages for loss of earning capacity, courts use multiplicand/multiplier formula. Tembo AR, adapting from McGregor on Damages, 15th ed., at page 905 states as follows in **Manda v Malawi Social Action Fund Civil Cause No. 756 of 2003 (unrep)**:

“In calculating the loss of earning capacity the courts have evolved a certain method. The amount of loss of earning is calculated by taking the figure of the plaintiff’s present annual earnings less the amount, if any, which he can now earn annually, and multiplying this figure by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum will be given now instead of periodic payments over years. The latter figure has come to be known as the multiplier and the former figure, the multiplicand... Further adjustment however has to be made to the multiplicand and multiplier on account of other factors like inflation the so called contingencies of life and taxation.”

Multiplicand

The multiplicand represents the Claimant’s actual or expected loss of annual earnings. The starting point in coming up with a multiplicand is what the plaintiff would have been earning at the date of trial or assessment, not what he was earning at the time of the accident. Tembo AR observes as follows in **Manda v Malawi Social Action Fund Civil Cause No. 756 of 2003 (unrep)**:

“The starting point for calculating the multiplicand has for long been the amount plaintiff earned before his injury ... the starting point is what the plaintiff would have been earning at the date of trial, or assessment herein if not for the injury. From that is discounted whatever the plaintiff is capable to earn in the future. If he cannot earn anything nothing falls to be deducted. For the multiplier the starting point in calculating it is the number of years that it is anticipated the plaintiff’s disability will last. That calculation falls to be made from the date of trial and requires medical testimony.”

An amputated finger and crushed finger affects one’s grip and, therefore, impairs one’s ability to do physical jobs. In the case of **Manda v Malawi Social Action Fund, Civil Cause No. 756 of 2003 (unrep)**

the Claimant had his right Index finger crushed and amputated. In calculating damages for loss of earnings and earning capacity, the court held as follows:

"It is unclear how long the plaintiff's incapacity will last herein. But the medical opinion is that another surgical operation is necessary to counter the constant pain and bleeding in the plaintiff's finger. This court notes that already since the time of the accident in January, 2000 the plaintiff has not been able to earn the K600.00 per month. So far the pain in the plaintiff's finger has not improved and so the prognosis is not good. Already for 3 years the plaintiff has been without his earning power."

Multiplier

The multiplier is the difference between the average life expectancy in Malawi and the age of the claimant.

The INDEPTH model estimate of the life table for males and females in Malawi as at 2008, according to **Population and Housing Census 2008, Analytical Report Vol. 2 (Mortality)** published by National Statistical Office, August 2010, puts exact life expectancies of a males and females at different ages (see Table below). Life expectancy for a male aged 25 is 34.4, as below.

Age	Male	Female
0	48.3	51.4
1	51.9	55.1
5	51.1	54.4
10	47.2	50.4
15	42.8	45.9
20	38.4	41.6
25	34.4	38.0
30	31.2	35.4
35	28.4	33.2
40	25.8	30.6
45	23.4	27.6
50	21.1	24.5
55	18.5	21.1
60	15.6	17.1

65	13.0	14.5
70	10.4	11.4
75	8.1	8.8
80	5.8	5.9
85	2.9	3.1

Alternatively, in the recent case of **Lucy Chitsotso Chatayika v Emmanuel Kaludzu and United General Insurance Co. Ltd**, Civil Cause No. 1146 of 2016 (unrep), the court put life expectancy in Malawi at 61.2 years. And the recent World Health Organization life tables for Malawi put life expectancy at 61 for males and 67 for females.

DETERMINATION

1ST CLAIMANT

DAMAGES FOR PAIN AND SUFFERING; LOSS OF AMENITIES OF LIFE AND DISFIGUREMENT

The injuries suffered by the first Claimant were as follows; fracture of the left tibia and fibula, leg shortening by 2cm, pains on the rib side, multiple abrasions and scars on the affected parts. She was treated at Rumphi District Hospital where she was hospitalized for one week and was thereafter treated as an outpatient for 8 months. PW1 had her leg cast in POP three times. The effects of the injuries that she suffered are that she still experiences pain on her leg, she still walks on serious limp, she can no longer bend or squat and she can no longer walk for a long distance without feeling pain. The first Claimant prayed for an award of a total sum of MK25,000,000.00 under this head and the amount was broken down as follows; MK10,000,000.00 as damages for pain and suffering; MK5,000,000.00 as damages for loss of amenities of life and MK10,000,000.00 for disfigurement.

The first Claimant cited four cases in support of her prayer under this head. The first case cited was that of **Thomson Chisenga v. Allie Mustapha and others** Personal Injury Cause No. 907 of 2019 (unrep) where the Claimant sustained a fracture of the right leg, bruises on both thighs and arms and severe head injuries. His leg was shortened, walks with a limp and he used crutches for a year. He was awarded MK7,500,000.00 for pain and suffering, loss of amenities of life and disfigurement on the 24th May 2021. The second case was the case of **Nyalai Davison v. John Kapalamula and Prime Insurance Company Limited**; Civil Cause No. 1216 of 2015 (unrep) in which the Claimant sustained a

fractured distal tibia on the left leg, deep cut wound on the left leg and serious deformity of the leg. He was awarded MK5,300,000.00 for pain and suffering and loss of amenities of life and MK1,200,000.00 for disfigurement on 29th May 2020.

The third case was that of **Tryson Gondwe v. Donald Gondwe and another Civil Cause No. 765 of 2018 (unrep)** where the Claimant sustained open fracture of tibia, cut wound on the upper eye and some abrasions. He was hospitalized at Rumphi District hospital and Mzuzu Central Hospital where he had his leg cast in plaster of paris. He could no longer walk without the aid of clutches and he was awarded MK5,500,000 as damages for pain and suffering and loss of amenities of life and MK700,000.00 for disfigurement on 2nd July 2019. The last case was that of **Alefa Mkwate v. Kunje Suwedi and Prime Insurance Company Limited [2019] MWHC 120** where the Claimant sustained fracture of tibia and fibula on the right leg leading to deformed and shortened leg, head injuries, bruises and multiple cuts on the left leg. The Claimant was failing to do normal household chores and had difficulties in walking and was awarded MK6,000,000.00 as damages for pain and suffering; loss of amenities of life and disfigurement.

This Court has taken proper consideration of the cases cited by the Claimant herein in support of her Claim for a sum of MK25,000,000.00 under this head. The cases cited do not support the huge claim that the Claimant has made herein as none of the cases made an award reaching MK8,000,000.00. I have also noted that in most of the cases cited by the Claimant; the injuries suffered by the Claimants in those cases were severe as compared to the injuries suffered by the Claimant herein. In my considered view that a total sum of MK4,000,000.00 will reasonably compensate the first Claimant on the injuries suffered for pain and suffering; loss of amenities of life and disfigurement.

DAMAGES FOR LOSS OF EARNINGS AND EARNING CAPACITY

The Claimant calculated damages payable under this head at MK82,882,800.00. This amount was arrived at by using the multiplier and multiplicand theory. It is in evidence that the Claimant was doing a business of selling bananas at Rumphi Boma and she used to make around MK15,000.00 to MK20,000.00 per day. The medical report submitted by the Claimant herself indicated that she will be able to perform her previous job and on that basis, it is not reasonable to use the calculations made by the Claimant as she can still proceed with her previous business. The loss to be compensated for would reasonably be the loss incurred for the time she was admitted in hospital and the time that she spent attending hospital as an outpatient. I have also to mention that the amounts stated by the

Claimant do not indicate as to whether those were total daily sales or daily profits and additionally, there is no proof of the amounts stated considering the nature of the business that the Claimant was engaged in. considering the circumstances of the present case; I will award a nominal sum of MK500,000.00 under this head.

The first Claimant is further awarded a sum of MK10,000.00 as cost for police and medical report.

2ND CLAIMANT

DAMAGES FOR PAIN AND SUFFERING; LOSS OF AMENITIES OF LIFE AND DISFIGUREMENT

The injuries suffered by PW2 were moderate head injury; dislocated left shoulder, multiple abrasions and scars on the affected parts. She was hospitalized for three days at Rumphu District Hospital and treated as an outpatient for a day. As a consequence of the accident, PW2 stated that she still experiences pain on her neck and that she can no longer carry heavy objects on her head. The prayer from the second Claimant was that she be awarded a sum of MK17,000,000.00 being MK6,000,000.00 as damages for pain and suffering; MK6,000,000.00 for loss of amenities of life and MK5,000,000.00 for disfigurement.

The second Claimant cited five cases in support of her claims. The first case was *Taona Violet Msiska v. Madalitso Banda and Consolidated Mining Industries*, Civil Cause No. 178 of 2016 (unrep) where the Claimant lost an earlobe, bled profusely, sustained deep cuts on her leg that exposed the bone and some nerves cut, hearing impaired and could no longer do farming. She was awarded MK5,800,000.00 for pain and suffering and for loss of amenities of life and disfigurement on 8th June 2018. In *Dyson v. Nico General Insurance Co Ltd Personal Injury Cause No. 278 of 2013 (unrep)* the Claimant suffered a deep cut wound on forehead, had multiple body bruises, severe headache and painful neck. He had difficulties in hearing; he could not sleep or lie on left side and was unable to do sports or gardening. He had vulgarly scarred forehead and knees. His permanent incapacity was assessed at 15 percent. He was awarded MK3,500,000.00 for pain and suffering and loss of amenities of life and MK1,000,000.00 for disfigurement on 6th January 2014.

The case of *Kayange v. Chita One Investment and another Personal Injury Cause No. 278 of 2013 (unrep)* was also cited. In that case, the Claimant sustained head injuries, multiple injuries and partial blindness to left eye. He was awarded MK4,500,000.00 for pain and suffering and loss of amenities of life on 9th January 2014. In *Patrick Chibwana v AirCargo Limited and Nico General Insurance*

Company Limited, Personal Injury Cause Number 492 of 2013 (unrep) the Claimant sustained bruises on the face, swollen head, deep bruises on the hand, swollen hand, traumatic neck pains, traumatic pain on the knee, multiple deep cuts in the head and bruises on the face, back and both knees. The Claimant was awarded MK3,000,000.00 for pain and suffering, MK1,000,000.00 for loss of amenities of life and MK1,000,000.00 for disfigurement on 12th April 2021.

This Court has considered the injuries suffered by the second Claimant herein as seen from her evidence and the medical as well as the police reports. I have also appreciated the injuries suffered by the various Claimants in the in the various cited precedents. Additionally, the Court was able to appreciate the current status of the Claimants during the hearing of the present matter. I must state that the injuries suffered by the first Claimant were more serious compared to the injuries suffered by the second Claimant. In the circumstances of the present case, this Court proceeds to award a sum of MK3,500,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement.

DAMAGES FOR LOSS OF EARNINGS AND EARNING CAPACITY

This Court proceeds to award a nominal sum of MK500,000.00 on this head on the same basis as discussed with respect to the first Claimant.

The second Claimant is further awarded a sum of Mk10,000.00 for the cost of police and medical report.

FINDING

Having appreciated the circumstances of the present case; this Court has made the following awards;

For the 1st Claimant

- (a). MK4,000,000.00 as damages as damages for pain and suffering, loss of amenities of life and disfigurement.
- (b). MK500,000.00 as damages for loss of earnings and loss of earning capacity
- (c). MK10, 000.00 being special damages for obtaining a police and medical report

For the 2nd Claimant

- (a). MK3,500,000.00 as damages for pain and suffering, loss of amenities of life and disfigurement
- (b). MK500,000.00 as damages for loss of earnings and earning capacity
- (c). MK10,000.00 as cost of police and medical report.

The Claimants are further awarded costs of this action to be agreed by the parties failing which to be assessed by the Court.

MADE IN CHAMBERS THIS 31st DAY OF MARCH 2023



ANTHONY PHILIZANI KAPASWICHE

ASSISTANT REGISTRAR